

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
KAREN R. BAKER, JUDGE

DIVISION I

CA07-00016

GENEVA CLARK

MARCH 12, 2008

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| | APPELLANT | APPEAL FROM THE GRANT COUNTY CIRCUIT COURT [NO. DR-03-25-1] |
| v. | | |
| RODNEY O. TOBIAS | APPELLEE | HONORABLE CHRIS E WILLIAMS, JUDGE |

AFFIRMED

Appellant Geneva Clark appeals from the Grant County Circuit Court's order granting appellee Rodney O. Tobias's motion to vacate the child support order and findings of fact and setting aside the affidavit of sworn statement of paternity and order. Ms. Clark has two arguments on appeal. First, Ms. Clark argues that the trial court erred by granting Mr. Tobias's motion to vacate the child-support order on the basis that service of the affidavit of paternity and order was required under Ark. R. Civ. P. 4(d)(8)(A) and (C). Second, Ms. Clark argues that the trial court erred by granting Mr. Tobias's motion to vacate the child-support order after ninety days, absent sufficient evidence of fraud as required by Ark. R. Civ. P. 60 (c)(4). We affirm.

On February 12, 2003, Mr. Tobias filed a complaint for divorce from Ms. Clark. Within his complaint for divorce, Mr. Tobias requested a DNA test to determine if he was the biological father of R.D.T., born to Ms. Clark prior to the parties' marriage. On July 23, 2003, the court entered an

order, agreed to by the parties, directing the parties to undergo a DNA test. The parties' divorce decree was entered on January 28, 2004. Paragraph five of the decree recognized that the parties had previously submitted to a DNA test and that the test determined that Mr. Tobias was not the father of the minor child. However, the parties agreed to one additional DNA test at Ms. Clark's expense, to resolve the issue of paternity, and therefore, the court did not enter a finding of paternity on that date.

A year and a half later, on September 20, 2005, an affidavit of paternity was filed with the court. Mr. Tobias's signature appeared on the last page of the affidavit. In the affidavit, Mr. Tobias willfully acknowledged that he was the father of the minor child. Also in the affidavit, Mr. Tobias relinquished all rights to any further paternity testing, agreed to pay seventy-five dollars per week child support through automatic wage withholding, agreed to provide medical and dental insurance for the minor child, and agreed to pay one half of any remaining medical or dental bills. Based on the affidavit, the court entered an order on December 7, 2005, finding that Mr. Tobias acknowledged that he was the biological father of the minor child and accepting the parties' agreement for paying child support in the amount of seventy-five dollars a week through wage withholding.

On May 5, 2006, Ms. Clark filed a motion to modify child support, seeking to increase Mr. Tobias's child-support obligation. Shortly thereafter, Mr. Tobias filed an affidavit, a response to appellant's motion to modify support, and a motion to vacate the support order. In the pleadings, he alleged that Ms. Clark had submitted a fraudulent affidavit to the court and requested that the order be set aside pursuant to Rule 60 of the Arkansas Rules of Civil Procedure.

At a hearing on Mr. Tobias's motions, Mr. Tobias testified he was unaware that the affidavit existed until he visited the clerk's office to inquire about an increase in his child-support payments

(which he believed were for the benefit of his oldest daughter living in Oklahoma). While he was there, a member of the clerk's staff pulled the affidavit (regarding support for R.D.T.) from his file. He testified that was the first time he had seen the affidavit and that he was not aware that he was paying child support for R.D.T.

Mr. Tobias also admitted that his signature appeared on the affidavit; however, he did not recall signing an affidavit acknowledging that he was the father of the minor child and agreeing to pay child support. He testified that he thought he was signing a document that would relinquish Ms. Clark's financial responsibility for a truck that the two of them purchased together. Moreover, he did not sign the affidavit before a notary public. He testified that he and Ms. Clark did not discuss the contents of the affidavit and that he was completely unaware of what he was signing. Although the signature page contained language assigning the responsibility for medical and dental insurance to Mr. Tobias and language assigning half of the responsibility for the remaining medical bills to Mr. Tobias, he explained that he was in a rush when presented with the document, and he simply signed and dated the document without reading the language that appeared at the top of the signature page.

Mr. Tobias testified that during the time period from September 2004 until February 2006, he voluntarily placed seventy-five dollars in a joint account (opened for the purpose of paying child support for R.D.T.). However, once he learned of the automatic withholding put into place by court order for R.D.T.'s child support, he immediately ceased placing any additional money in the joint account.

Ms. Clark testified that she and Mr. Tobias drafted the affidavit together, and Mr. Tobias read the entire document. Therefore, he was fully aware of the contents of the document. She

testified that although the first paternity test proved that Mr. Tobias was not the child's biological father, Mr. Tobias had been active in R.D.T.'s life from the time R.D.T. was born. She stated that Mr. Tobias wanted to reconcile, and he did not want to have the additional paternity test done. Although she knew that Mr. Tobias was not the biological father of the child, she agreed to the affidavit because Mr. Tobias wanted to be recognized as the father of the child. Ms. Clark testified that she was employed at the Jefferson County Prosecuting Attorney's office, and that she prepared the affidavit and order (without help from an attorney) directing Mr. Tobias's employer to withhold seventy-five dollars in child support from his wages.

At the hearing, the trial judge set aside the December 7, 2005 order. The court further set aside any obligation of Mr. Tobias to support the child. The trial court found that both Mr. Tobias and Ms. Clark had committed fraud on the court in that both parties had failed to follow the directives of the court's order and submit to a final DNA test. The trial court also set aside the affidavit based on the fact that Ms. Clark prepared the document and according to Mr. Tobias's testimony, he did not read the document entirely before signing it nor did he understand it. The trial court directed the parties to submit the results of a new paternity test to the court within sixty days.

At a second hearing, the trial court found Mr. Tobias's testimony that he was unaware of the contents of the affidavit before signing it to be credible. The trial court found that there was a fraud on the court. The trial judge specifically stated that:

The testimony being feathered out and the credibility of the witnesses before this Court, this Court finds that Mr. Tobias' statement is more clear and true than hers. It is obvious that there was fraud intended upon the court. Ms. Clark even made a request in the affidavit to do an automatic withdrawal. She also put the language "garnish" in the support order so that she could perfect a withdrawal of funds out of his payroll. I'll enter the Order as it is so drafted, in addition to changing the typographical errors.

This appeal followed.

Ms. Clark argues that the trial court erred in requiring that service of the affidavit was required under Ark. R. Civ. P. 4(d)(8)(A) and (C) because the court retained jurisdiction pursuant to *Dickson v. Fletcher*, 361 Ark. 244, 206 S.W.3d 229 (2005). Although Ms. Clark argues that the trial court incorrectly applied Ark. R. Civ. P. 4, the trial court's order specifically found that service was in violation of Ark. R. Civ. P. 5, not Rule 4. Accordingly, we find that her argument has no merit.

Ms. Clark also argues that the trial court erred by granting Mr. Tobias's motion to vacate the child-support order after ninety days, absent sufficient evidence of fraud as required by Ark. R. Civ. P. 60 (c)(4). We review a trial court's decision under Rule 60 for an abuse of discretion. *Fritzing v. Beene*, 80 Ark. App. 416, 97 S.W.3d 440 (2003). Rule 60(c)(4) of the Arkansas Rules of Civil Procedure (2007) states:

(c) The court in which a judgment, other than a default judgment [which may be set aside in accordance with Rule 55(c)] has been rendered or order made shall have the power, after the expiration of ninety (90) days of the filing of said judgment with the clerk of the court, to vacate or modify such judgment or order:

* * *

(4) For misrepresentation or fraud (whether heretofore denominated intrinsic or extrinsic) by an adverse party.

The elements of fraud are: (1) a false representation of material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; (4) justifiable reliance on the representation; (5) damage suffered as a result of the reliance. *Bullock v. Barnes*, 366 Ark. 444, 236 S.W.3d 498 (2006) (citing *Tyson Foods, Inc. v. Davis*, 347 Ark. 566, 66 S.W.3d 568 (2002)). The party seeking to set a judgment aside for fraud has the burden of proving fraud by clear, cogent, and convincing evidence, or, as our courts have sometimes said, clear, strong, and satisfactory proof.

Id.

Practicing a fraud on the court is a sufficient ground to vitiate a judgment. *McGuire v. Smith*, 58 Ark. App. 68, 946 S.W.2d 717 (1997). Even though the fraud that vitiates a judgment may be constructive rather than actual, constructive fraud is nonetheless a species of wrongdoing. *Id.* (citing *Ark. State Hwy. Comm'n v. Clemmons*, 244 Ark. 1124, 428 S.W.2d 280 (1968)). Constructive fraud is defined as a breach of a legal or equitable duty that, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others; neither actual dishonesty nor intent to deceive is an essential element. *Id.* Appellant's submission of the affidavit that purported to be an agreement of the parties, but was not, constituted constructive fraud. The trial court, therefore, did not abuse its discretion in setting aside its previous order.

Ms. Clark's only argument as to whether fraud was established is as follows: the court did not credit Mr. Tobias's testimony and did not identify any fraudulent activity by Ms. Clark. Ms. Clark is mistaken. The court clearly found Mr. Tobias's testimony credible. The court also found that Ms. Clark's preparation of the affidavit; her procurement of Mr. Tobias's signature on the last page of the affidavit (without Mr. Tobias having seen the first page); and her submission of the affidavit to the court were fraudulent. Thus, we find no abuse of discretion.

Affirmed.

PITTMAN, C.J., and GLADWIN, J., agree.